APPEAL NO. 93299

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). On March 25, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The issues at the CCH were:

a.did the Claimant sustain a repetitive trauma injury in the course and scope of her employment on or about (date of injury);

b.did the Claimant report the injury to the Employer no later than the 30th day after the date on which she knew or should have known that the injury might be related to the employment; and,

c.did the Claimant sustain disability, and, if so, what temporary income benefits are due the Claimant.

The hearing officer determined that claimant knew or should have known that she had a repetitive trauma injury, i.e., carpal tunnel syndrome (CTS), on (date of injury); that claimant reported the claimed injury to the employer within 30 days of (date of injury), but that claimant is not entitled to workers' compensation benefits because the employer did not have workers' compensation insurance coverage on (date of injury); and that claimant did not have disability under the 1989 Act because the injury was not a compensable injury.

Appellant, claimant herein, appeals, indicating she disagrees with those findings of fact and conclusions of law which do not support her theory and restating the evidence in support of her position. Respondent, carrier herein, filed an untimely response.

DECISION

The decision of the hearing officer is affirmed.

Claimant's appeal was timely filed on April 14, 1993. The response must be filed not later than the 15th day after the date on which the request for appeal is served. Article 8308-6.41(a). Carrier alleges it "did not become aware of the subject request for review until May 4, 1993." Claimant, however, produced a green receipt card showing the request for review had been mailed to carrier, at carrier's listed (city), Texas, address on April 14, 1993 with a date of delivery of "4-16-93." The response would have due on Saturday, May 1, 1993 but, pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.3 (rule 102.3) when the last day of filing is a Saturday, Sunday, or a legal holiday, the time is extended to the next business day, which would have been May 3, 1993. Carrier's response on May 4, 1993 was not timely filed and will not be considered.

The facts are somewhat convoluted and difficult to follow. The evidence in this case

is fairly and accurately set out in the hearing officer's statement of evidence and is adopted for purposes of this decision. Summarizing briefly, claimant testified she was a shift leader at a fast food restaurant operated by ., herein employer. Claimant's job involved all phases of a fast food operation including "cutting hamburger" and cooking burgers on a grill. Claimant stated, and it is undisputed, that she had fallen and sustained injuries to the neck, upper back, and left hand on September 23, 1991, in an accident not at issue in this case. It is not entirely clear, but claimant apparently saw (Dr. H), a chiropractor, on September 26, 1991 with complaints of back, neck and shoulder pain. Claimant filed a workers' compensation claim for the September 23rd fall. On 10-9-91 (Dr. C), apparently another doctor she was seeing due to the September 23rd fall, ordered cervical and thoracic magnetic resonance imaging (MRI) tests. On (date of injury), claimant was referred to Dr. Khalil (Dr. K), a neurologist, for a neurological examination related to claimant's September 23rd fall. Claimant testified she had experienced pain and numbness in her right wrist since approximately 1989, two years before the events of September-October 1991. Dr. K was doing the examination primarily for problems associated with her fall, but found a "probable protruded cervical disc" and "Right carpal tunnel." Dr. K gave the date of injury as September 23, 1991, the date of claimant's recent compensable injury. The claimant reported the CTS injury to the employer on November 6, 1991, including page 3 of Dr. K's report which listed the "right carpal tunnel."

Claimant completed a TWCC-41 (Employee's Notice of Injury or Occupational Disease and Claim for Compensation) on November 11, 1991, claiming a repetitious trauma injury (i.e., CTS) in her right hand and wrist, showing the injury date as "discovered 10-25-91" and stating she first knew the disease was work related on "10-25-91." Claimant received workers' compensation benefits for her September 23rd fall until summer of 1992. Claimant, during that time, sought additional temporary income benefits (TIBS) for the CTS, but the carrier refused to pay double TIBS, informing claimant she was entitled to TIBS for only one injury at a time. In the meantime, claimant saw(Dr. A), who, by report to Dr. K dated December 12, 1991, stated that claimant ". . . has a bilateral carpal tunnel syndrome which is more pronounced on the left side and significant cervical root irritation. . . ." When income and impairment benefits for claimant's September 23rd fall were all paid, claimant sought compensation for the claimed CTS injury of (date of injury). Apparently, claimant initially sought benefits from the employer's health coverage plan for her "right carpal tunnel" based on Dr. K's report of (date of injury). The employer's health care carrier rejected the claim on the grounds that the injury occurred prior to the effective date of its coverage (October 15, 1991) based on Dr. K's report listing the date of injury as September 23, 1991. Claimant had surgery for CTS in both hands during the summer of 1992. Claimant then amended the previous TWCC-41 on September 28, 1992, to report bilateral CTS, changed the date of injury from (date of injury) to (date of injury), and listed Dr. A as the treating doctor.

As the hearing officer notes, "[t]he change of date is significant because the Employer

became a non-subscriber to workers' compensation on October 15, 1991. If (date of injury), is the valid date of injury, and if the Claimant could relate the injury to her work, she would be entitled to benefits of the Act. On the other hand, if (date of injury), is the valid date of injury, the Claimant would not be entitled to benefits of the Act, . . . [because] the Employer did not have workers' compensation coverage on (date of injury)."

The hearing officer, in his statement of evidence, recites claimant's reason for selecting (date of injury) as the date she knew she had CTS (while in the doctor's office on that date she read a pamphlet on CTS and recognized the symptoms she had been having) and discusses in detail the evidence in favor of October 25th as opposed to October 9th as being "the correct date of injury." Basically, the hearing officer determined (date of injury) was the date claimant first knew she had CTS because claimant had seen two or more doctors between October 9th and October 25th and the records do not reflect pain or complaints about the right wrist. The hearing officer notes, while referring to the treating doctor, Dr. K, that "the first time a medical record makes reference to pain in [claimant's] hand and wrists occurs (sic) is not until January 30, 1992. . . ." We note that is not quite accurate in that Dr. A, in her report of December 12, 1991 to Dr. K, discusses claimant's CTS at some length and notes "cutting hamburgers worsens [claimant's] symptoms and she has occasionally dropped things secondary to the numbness." We believe this report also provides some connection between claimant's employment and her CTS.

As stated previously, the hearing officer found that claimant had sustained a repetitive trauma injury, that she knew or should have known that the injury was related to her employment on (date of injury), and that it was reported to the employer within 30 days of (date of injury). Claimant disagrees with the hearing officer's findings of fact and conclusions of law which indicate that claimant was not aware of her CTS until October 25th, the finding there was no causal connection between claimant's work and her CTS, and the conclusions of law upon which the objected to findings are based.

Article 8308-1.03(36) defines occupational disease and states that the term includes repetitive trauma injuries. Claimant is claiming a repetitive trauma injury to her wrists caused the CTS. Claimant undisputedly had bilateral CTS, which was operated on in the summer of 1992. The key issue, as litigated in this case, is the date of injury. Article 8308-4.14 states:

For purposes of this Act, the date of injury in the case of an occupational disease is
> the date on which the employee knew or should have known that the disease may be related to the employment.

Claimant, at the CCH, contended that she knew she had CTS on (date of injury), when she read about the disease in the doctor's office. It is undisputed the first time that claimant was medically diagnosed with having CTS was on (date of injury), by Dr. K, who

was examining her for a September 23rd back injury sustained in a fall. The hearing officer stated "[i]n choosing between October 25 and October 9 as the correct date of injury, we need to look at the evidence." He then proceeded to discuss the facts in favor of each date. The hearing officer obviously had some problems with the fact claimant saw two or more doctors between October 9th and October 25th without mentioning or complaining of wrist pain. The hearing officer also noticed the coincidence that the date claimant remembers her self-diagnosis of CTS as being a week before the employer cancelled its workers' compensation coverage and became a nonsubscriber to workers' compensation and questions the fact that the amended TWCC-41, with the changed dates, was filed almost a year after the claimant became aware, according to her testimony, of her CTS.

In any event, when claimant knew or should have known that her CTS was related to her employment and whether it was timely reported to the employer are factual determinations. The hearing officer, as he correctly stated at the hearing, is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Article 8308-6.34(e). The claimant testified as to when she knew she had CTS and that it was work related, but claimant's testimony is that of an interested party and, as such, that testimony only raises an issue of fact for the trier of fact. Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). The hearing officer may believe all, part or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). The hearing officer here clearly believed that claimant first knew she had CTS when she was so diagnosed by Dr. K on (date of injury). In that this becomes the date of injury, the 1989 Act does not apply because the employer, on that date, had cancelled its workers' compensation insurance coverage and became a nonsubscriber to the 1989 Act. Where, as here, there is sufficient evidence to support the hearing officer's determinations, there is no sound basis to disturb that decision. Only if we were to determine, which we do not in this case, that the determinations of the hearing officer were so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust would we be warranted in setting aside the decision. In re King's Estate, 241 S.W.2d 660 (Tex. 1951). Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992.

The decision of the hearing officer is affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Gary L. Kilgore
Appeals Judge